

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PACIFIC COAST STEEL, *et al.*,

Plaintiffs,

vs.

TODD LEE LEANY, *et al.*,

Defendants.

Case No. 2:09-cv-02190-KJD-PAL

ORDER

(Mot to Compel - Dkt. #203)

Before the court is Plaintiffs' Motion to Compel Accountants' Responses (Dkt. #203), filed December 7, 2010. The court has considered the Motion, Defendants Todd Leany and the Century Entities' Opposition (Dkt. #207), Lynn Leany and the Lynn Leany Trust's Opposition (Dkt. #208), and Plaintiffs' Reply (Dkt. #212).

This is yet another motion to compel filed by Plaintiffs concerning tax and financial records. The undersigned required Defendants to disclose and produce financial and tax information responsive to Plaintiffs' discovery requests in an Order (Dkt. #93) which the district judge affirmed in an Order (Dkt. #214) over the Defendants' objections. When the Defendants resisted disclosure of financial and tax information, and while the objections to the undersigned's order compelling the Defendants to produce financial and other tax information were pending, Plaintiffs' counsel served subpoenas *duces tecum* on Diane W. Clough ("Clough"), Hall & Associates CPA, Ltd., and Rich, Wightman & Co., CPAs LLC, Defendants' accountants. Although the Plaintiffs believe that discovery of the information subpoenaed would be determined by Judge Dawson's order either affirming or overruling or modifying the undersigned's order, this motion to compel was filed "out of an abundance of caution".

I. Plaintiffs' Motion to Compel (Dkt. #203)

Plaintiffs subpoenaed documents concerning the Leany entities' tax work papers and tax returns.

1 The non-party accountants did not file objections or move to quash the subpoena. However, based
2 upon the advice of opposing counsel, the Leany entities' accountants have refused to produce
3 responsive documents, citing privacy issues and other "vague concerns."

4 On June 22, 2010, the court entered a protective order precluding Plaintiffs from using
5 confidential documents obtained pursuant to subpoenas for any purpose outside this litigation.
6 Defendants indicated in several of their responses that they would produce Plaintiffs' requested
7 documents upon entry of the protective order. However, they did not do so, and the accountants were
8 subpoenaed to obtain the discovery by other means.

9 Clough, Wightman, and Hall have not produced the tax work documents. Plaintiffs argue the
10 material they seek is not burdensome, and that the subpoenas were only issued after the undersigned
11 found that financial documents from 2006 to the present were relevant and discoverable at the hearing
12 conducted June 22, 2010. *See* Minute Order, Dkt. #93. The Plaintiffs also argue is the material they
13 seek is not protected by the accountant-client privilege. At the hearing held on June 22, 2010, the
14 undersigned found that the accountant-client privilege was not as broad as the Defendants claimed, and
15 that the accountants' assertion of the privilege was not proper basis to resist this discovery.
16 Additionally, Plaintiffs argue Hall did not provided a privilege log, and has not indicated that it would
17 comply with its obligations to produce a privilege log.

18 **II. Defendants Todd Leany and the Century Entities' Opposition (Dkt. #207)**

19 Defendants argue Plaintiffs motion failed to give notice to the parties to whom it was directed.
20 Plaintiffs only served the motion on the parties to this case and not the subpoenaed third parties, and
21 that the non parties have been deprived of the opportunity to demonstrate that the burden of complying
22 with the subpoenas is undue. To date (as of the filing of the opposition at least), none of the
23 subpoenaed entities were aware that the motion to compel then to respond had been filed..

24 Secondly, there is no statement from counsel indicating they made an effort to consult with the
25 non parties who are subject to the subpoenas at issue. Accordingly, Plaintiffs have not complied with
26 LR 26-7, and the motion should be denied.

27 Third, Defendants argue Plaintiffs' motion misconstrues the breadth of the court's prior orders.
28 The court has never addressed the specific subpoenas at issue here and the question of whether the

1 information requested by the subpoenas at issue request material subject to the accountant-client
2 privilege or whether the subpoenas place an undue burden on the subpoenaed non parties. The material
3 requested by Plaintiff is protected by the accountant-client privilege, and contrary to Plaintiffs'
4 assertion, Hall did provide a privilege log.

5 Finally, the Century Defendants reassert the arguments they made regarding the relevance and
6 appropriateness of the information being sought by subpoena, including the scope of the corporate
7 financial information sought from the corporate entities and the personal tax and financial information
8 sought from Todd Leany.

9 **III. Lynn Leany and the Lynn Leany Trust Opposition (Dkt. #208)**

10 The Lynn Leany Defendants also assert that Plaintiffs have not served the motion on the
11 subpoenaed parties and have not complied with LR 26-7, and the motion should be denied on these
12 grounds.

13 These Defendants also argue that Plaintiffs' subpoenas to the accountants improperly seek
14 privileged, confidential, and irrelevant documents. The documents Plaintiffs seek are subject to the
15 accountant-client privilege, and the requests invade Leany's privacy rights. The only reason Plaintiffs
16 are seeking this information is to conduct an improper judgment debtor exam.

17 **IV. Plaintiffs' Reply in Support of Motion to Compel (Dkt. #212)**

18 Plaintiffs reiterate that this matter was largely decided by the undersigned on June 22, 2010,
19 when I held that the Plaintiffs had made a sufficient preliminary showing to support the finding that the
20 requests to non party financial institutions for Mr. Leany's financial records were discoverable subject
21 to a protective order precluding the parties from disclosing or using the records for any purpose
22 unrelated to this litigation.

23 Plaintiffs assert that Defendants contention the motion was not served on the accountants is
24 merely a ploy to dissuade the court from deciding this matter on the merits, but offer to serve the
25 motion on the accountants if the court grants leave. Additionally, this procedural oversight should not
26 prevent this court from deciding the issue on the merits. Denying the motion due to lack of notice
27 would not resolve an issue that has been prevalent throughout the discovery process and will likely
28 result in a similar motion at a later date. The connection between the Defendants and the accountants is

1 evident through the accountants written objection to the subpoenas, in which they assert that they will
2 not produce the documents because they are covered by the accountant-client privilege.

3 Plaintiffs assert they have met and conferred with the subpoenaed parties and defense counsel to
4 resolve the dispute prior to the motion to compel being filed. Further, because it is Defendants who
5 oppose the requests, rather than the accountants, conferring with the accountants would have been
6 futile, as Plaintiffs' counsel would have simply been directed to defense counsel. Plaintiffs assert that
7 the accountants are certainly aware of this dispute, and because it is Defendants themselves who would
8 hold any applicable accountant-client privilege, conferring with Defendants on this issue was
9 reasonable.

10 Plaintiffs reiterate their arguments that the documents subpoenaed are not protected by the
11 account-client privilege. Defendants have offered no specific proof indicating the requested
12 information comes within the protection of the privilege. Plaintiffs assert that the privilege cannot
13 apply because the financial information was used by Defendants to perpetrate a fraud on Plaintiffs.

14 DISCUSSION

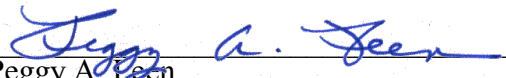
15 The accountants who were subpoenaed to provide the tax records at issue in this motion did not
16 file a motion to quash the subpoenas *duces tecum*. Non party Diane Clough filed a response to the
17 subpoena objecting that the information sought is protected by the accountant-client privilege under
18 NRS 49.185. The objection was accompanied by a privileged document log which identified 1,218
19 documents. Wightman & Company also sent a letter to opposing counsel objecting to complying with
20 the subpoena on the grounds it would require disclosure of accountant-client communications. The
21 letter indicated that the clients, through its counsel, had advised the CPA firm that the Defendants
22 would not waive the privilege. Additionally, the letter indicated that "the copiousness of the documents
23 requested combined with the limited time given to identify documents related to twenty-one entities
24 covering a five-year period is unreasonable, and that the associated costs to the firm were unreasonable.

25 The motions to compel were not served on the non party entities on whom the subpoena *duces*
26 *tecum* were served. Defendants are correct that a party seeking to compel a non-party to comply with
27 the subpoena must serve a motion to compel compliance with the subpoena on the person commanded
28 to produce documents. Fed.R.Civ.P. 45(c)(2)(B). Additionally, the court has compelled the Defendants

1 to produce financial and tax record the court has found relevant and discoverable within the meaning of
2 Rule 26(b). Accordingly,

3 **IT IS ORDERED** that Plaintiffs' Motion to Compel Accountants' Responses (Dkt. #203) is
4 **DENIED.**

5 Dated this 29th day of September, 2011.

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8 Peggy A. Teen
9 United States Magistrate Judge
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